United Nations A/HRC/38/NGO/88

General Assembly

Distr.: General
11 June 2018

English only

Human Rights Council
Thirty-eighth session
18 June-6 July 2018
Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Joint written statement* submitted by the International Service for Human Rights, Allied Rainbow Communities International, Asian Forum for Human Rights and Development, Federatie van Nederlandse Verenigingen tot Integratie Van Homoseksualiteit - COC Nederland, International Gay and Lesbian Human Rights Commission, International Lesbian and Gay Association, Swedish Federation of Lesbian, Gay, Bisexual and Transgender Rights - RFSL, non-governmental organizations in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[25 May 2018]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

GE.18-09482(E)
1809482

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State obligations to protect the rights of LGBTI defenders*

The International Service for Human Rights makes this submission in collaboration with organisations working to promote and protect human rights on the basis of sexual orientation, gender identity and expression, and sex characteristics (SOGIESC), including ARC International, FORUM-ASIA, COC Netherland, GATE International, ILGA, Intersex Human Rights Australia, Outright International, Stonewall UK and RFSL.

This submission outlines the legal framework underpinning the rights of Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) rights defenders (LGBTI defenders), and the State obligations that if implemented, would ensure the protection of the rights of LGBTI defenders.

Risks faced by LGBTI defenders

As set out in the joint submission to the 35th session of the Human Rights Council[1], LGBTI defenders have been identified as a group of defenders most at risk.[2] In addition to risks defenders are commonly subject to; LGBTI defenders face greater and more specific challenges than others; because of their identity and work that challenges social, religious and cultural norms, they are targeted by States, non-State actors, and members of their own community, even other defenders. LGBTI defenders suffer stigmatization, lack of recognition and support from civil society, criminalization, legal barriers to freedom of association, smear campaigns, arbitrary arrest, detention and killings.[3]

International legal framework for the protection of LGBTI defenders

Everyone is born free and equal in dignity and in rights.[4] Sexual orientation and gender identity are impermissible bases for discrimination regarding the application of these rights.[5]

Everyone has the right to defend human rights and fundamental freedoms.[6] Further, States must respect, protect and give effect to the right of every one, 'individually and in association with others, to promote the protection and realisation of human rights [...], without discrimination on the basis of sexual orientation or gender identity'.[7]

Everyone has the right, individually and in association with others, to develop and discuss new human rights ideas and principles and to advocate their acceptance.[8] This takes into account the evolving nature of the development and strengthening of human rights norms, and allows for LGBTI defenders to advocate on areas such as legal gender recognition, non-consensual surgeries & procedures, and gender inclusive laws and policies.

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1 Joint NGO submission to 35th session of Human Rights Council;
https://www.ishr.ch/sites/default/files/documents/joint_written_statement_-_hrc_35_-_international_service_for_human_rights_allied_rainbow_communities_international_amnesty_international_human_rights_watch_international_lesbian_and_gay_association-3.pdf

2 SR on HRD, A/HRC/28/63, 29 December 2014.

3 Above n, 1.

4 Article 1, Universal Declaration of Human Rights.

5 Article 2 of the Universal Declaration; Article 2 of the ICCPR; Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR); CRC, Article 2; CEDAW, Article 2(f); CRPD, Article 5(2); Principle 2, Yogyakarta Principles.

6 United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration on human rights defenders).

7 Principle 27, Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (Yogyakarta Principles).

8 Article 7, Declaration on human rights defenders. This right can be considered an elaboration of the right to freedom of expression, the right to freedom of assembly and the right to freedom of association which are contained in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and other international legal instruments, see: http://www.ohchr.org/Documents/Issues/Defenders/CommentarytoDeclarationondefendersJuly2011.pdf (p. 83f.)

State obligations required for the protection of LGBTI rights defenders

The State obligations detailed below are set out in the Yogyakarta Principles (YPs) and the YPs plus 10.

The Right to Information
States must take legislative, administrative and other measures to ensure all persons have access to information about civil, political, economic, social and cultural rights, including how these rights apply in relation to SOGIESC.[9] States must make available international and regional instruments, national laws and regulations and all other information necessary to enable the exercise of any human rights or fundamental freedoms.[10]

The right to participate in public life
States should develop and implement affirmative action programmes to promote public and political participation for persons marginalised on the basis of SOGIESC.[11]

The right to promote human rights
States should enact a law including to establish, designate or maintain an adequately resourced mechanism, for the protection of LGBTI rights defenders.[12] States should ensure the participation of individuals and organisations working on human rights issues related to SOGIESC in public and political decision-making processes that affect them.[13]

The Right to State Protection from violence, discrimination and other harm by government officials or any individual group
States must:

- Exercise due diligence to prevent, investigate, prosecute, punish and provide remedies for discrimination, violence and other harm on the basis of SOGIESC, whether committed by State or non-State actors.[14]
- Take appropriate measures to eradicate all forms of violence, discrimination and other harm, including advocacy of hatred that constitutes incitement to violations on grounds of SOGIESC.[15]
- Compile statistics and research on the extent, causes and effects of violence, discrimination and other harm and on the effectiveness of measures to prevent, prosecute and provide reparation for such harm on the basis of SOGIESC.[16]
- Develop, implement and support education programmes to promote human rights and to eliminate prejudices on grounds of SOGIESC.[17]
- Ensure sensitivity training of judicial and law enforcement officers and other officials on issues relating to SOGIESC.[18]

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9 UN Declaration on Human Rights Defenders, Article 14(1); YP+10, Additional State obligations relating to Principle 19, G.
10 UN Declaration on Human Rights Defenders, Article 14(2); YP+10, Additional State obligations relating to Principle 19, H.
11 UN Special Rapporteur on the rights to freedom of assembly and of association, *Threats against Groups Most at Risk When Exercising Assembly and Association Rights*, para 73(c), A/HRC/26/29; YP+10, Additional State obligations relating to Principle 25, E.
12 UN Declaration on Human Rights Defenders, Article 14(3); UN Human Rights Council resolution A/HRC/RES/13/13, para 5; YP+10, Additional State obligations relating to Principle 27, F.
13 UN Declaration on Human Rights Defenders, Article 8; YP+10, Additional State obligations relating to Principle 27, G.
14 Zarizana Abdul Aziz and Janine Moussa, Due Diligence Framework, http://www.duediligenceproject.org/ewExternalFiles/Due%20Diligence%20Framework%20Report%20final.pdf; See Committee Against Torture, General Comment no 2, CAT/C/GC/2, para 18; CEDAW General Comment 19; UN Commission on Human Rights resolution on violence against women; YP+10, Principle 30, A.
15 See Committee Against Torture, General Comment no.2, CAT/C/GC/2, para.18; CEDAW General Comment 19; UN Commission on Human Rights resolution on violence against women; YP+10, Principle 30, B.
16 See Committee Against Torture, General Comment no.2, CAT/C/GC/2, para 18; CEDAW General Comment 19; UN Commission on Human Rights resolution on violence against women; YP+10, Principle 30, C.
17 CRC General Comment No. 20; CRC General Comment No. 4, para 26 and 28; YP+10, Principle 30, E.

- Ensure that laws against rape, sexual assault, and sexual harassment protect all persons regardless of SOGIESC.[19]
- Ensure that human rights violations are vigorously investigated and, those responsible are prosecuted and, if convicted, punished.[20]
- Ensure access to effective complaints procedures and remedies, including reparation, for victims of violence, discrimination and other harm on grounds of SOGIESC.[21]

The right to freedom from criminalization and sanction on the basis of SOGIESC

States must:

- Ensure that legal provisions– including customary, religious and indigenous laws– do not criminalize SOGIE, or establish any form of sanction relating to them.[22]
- Repeal existing legislation and refrain from applying new laws that criminalize on the basis of SOGIESC.[23]
- Ensure training for the judiciary, law enforcement officers and healthcare providers in relation to their human rights obligations regarding SOGIESC.[24]
- Ensure that law enforcement officers and other individuals and groups are held accountable for any act of violence, intimidation or abuse based on the criminalisation of sexual orientation, gender identity, gender expression and sex characteristics.[25]
- Ensure effective access to legal support systems, justice and remedies for those who are affected by criminalisation and penalisation on grounds of SOGIESC.[26]

The right to access and use information and communication technologies, including the internet, without violence, discrimination or other harm based on SOGIESC

States must:

- Ensure open, affordable, equal access to information and communication technologies, regardless of SOGIESC.[27]
- Ensure the right to seek, receive, and impart information and ideas of all kinds, including those related to SOGIESC.[28]
- Respect and protect the privacy and security of digital communications, including the use by individuals of encryption, pseudonyms and anonymity technology.[29]
- Take all necessary measures to prevent, redress, and eliminate online hate speech and harassment based on SOGIESC.[30]

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18 CESCR Concluding observations on the former Yugoslav Republic of Macedonia (E/C.12/MKD/CO/2-4), 2016, para.26; CAT Concluding Observations on Uruguay (CAT/C/URY/CO/3), 2014, para.21(c); Report of the UN Special Rapporteur on extreme poverty, A/HRC/23/36/Add.2; YP+10, Principle 30, F.

19 CEDAW Concluding observations on Myanmar (2016), CEDAW/C/MMR/CO/4-5; CEDAW Concluding observation on Portugal (2015), CEDAW/C/PRT/CO/8-9; YP+10, Principle 30, H.

20 See Committee Against Torture, General Comment no.2, CAT/C/GC/2, para.18; CEDAW General Comment 19; UN Commission on Human Rights resolution on violence against women; YP+10, Principle 30, I.

21 See Committee Against Torture, General Comment no.2, CAT/C/GC/2, para.18; CEDAW General Comment 19; UN Commission on Human Rights resolution on violence against women; YP+10, Principle 30, J.

22 Toonen v. Australia, Human Rights Committee Communication No. 488/1992 (CCPR/C/50/D/488/1992), 1994; YP+10, Principle 33, A.

23 CCPR/C/PHL/CO/4; U.N. Doc. A/56/38; YP+10, Principle 33, B, C.

24 CCPR/C/PHL/CO/4; YP+10, Principle 33, E.

25 CCPR/C/PHL/CO/4; YP+10, Principle 33, F.

26 Universal Declaration on Human Rights, art.7; International Covenant on Civil and Political Rights, arts. 26 and 2(3a); Human Rights Committee, General Comment No. 20, 1992; Committee against Torture, General Comment No. 2 (CAT/C/GC/2), 2008; YP+10, Principle 33, G.

27 General Assembly adopted resolution 68/167; YP+10, Principle 36, A.

28 UN Declaration on Human Rights Defenders; YP+10, Principle 36, B.

29 David Kaye, 'Report of the Special Rapporteur on the promotion and protect of the right to freedom of opinion and expression', 2015; UN General Assembly resolution 68/167 on the right to privacy in the digital age et al; YP+10, Principle 36, D.

- Ensure that restriction of right to access and the use of information and to the right to privacy are reasonable, necessary and proportionate as required by law.[31]

Calls on the Independent Expert

The actions above are essential requirements for full State compliance with international human rights law obligations. Therefore, we call on the Independent Expert on violence and discrimination on the basis of sexual orientation and gender identity to:

1. Use the authoritative interpretations contained in the YPs and YPs plus 10 in engagement with States on issues relating to LGBTI defenders.
2. Engage with other relevant Special Procedures mandate holders and LGBTI defenders to identify specific protection needs of these individuals and organisations.

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*GATE International, Intersex Human Rights Australia, Stonewall UK, NGOs without consultative status, also share the views expressed in this statement.

30 Report of the Special Rapporteur on human rights defenders (A/HRC/31/55), 2016, para. 80; YP+10, Principle 36, G.

31 UN General Assembly resolution 68/167 on the right to privacy in the digital age et al; YP+10, Principle 36, C, E.